Supreme Court, U.S.
FILED
OCT 8 1992
OFFICE OF THE CLERK

(2)

92-634

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1992

STATE OF ALABAMA,

PETITIONER,

v.

McRAY GINGO, and
ATLAS INDUSTRIAL PAINTERS, INC.,

RESPONDENTS.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

WILLIAM DUNCAN LITTLE, III*
ROBERT DOUGLAS TAMBLING
ASSISTANT ATTORNEYS GENERAL

*COUNSEL OF RECORD

TABLE OF CONTENTS

PAGES

APPENDIX A..... 1

APPENDIX B..... 5

APPENDIX C..... 18

APPENDIX D..... 42

APPENDIX A

STATE OF ALABAMA	)	IN THE CIRCUIT
	)	COURT OF SHELBY
vs.	)	COUNTY, ALABAMA
	)	
McRAY GINGO, ATLAS INDUSTRIAL PAINTERS, INC., and ROBERT DALE WHITE	)	CASE NUMBERS CC-88-543, CC-89-050, and CC-90-450

ORDER

THE ABOVE CAUSES came on before the Court on the following motions filed by the parties, viz:

Motion for Pre-Trial Determination of Admissability of Evidence
Motion to Dismiss and for Contempt
Motion for Production and Disclosure
Motion to Consolidate
Motion to Suppress and Exclude

which were heard on October 12, 1990. At said hearing appeared counsel for the parties. After considering the

oral arguments of counsel, ore tenus testimony and the briefs of counsel, the Court finds:

1. That there are three Defendants charged with criminal violations of environmental offenses under Title 22 Chapter 30 of the Code of Alabama 1975.

2. That two Defendants, namely McRay Gingo and Atlas Industrial Painters, Inc. were indicted on November 18, 1988. Said Defendants employed the Honorable Frank Head as their attorney who filed Motion for Production and Disclosure on February 15, 1989, which was granted pursuant to Rule 18.1 of A.R.C.P. on February 24, 1989. Said motion sought discovery of all scientific test or experiments made by the State, as well as, andy [sic]

and all tangible evidence in the State's possession, care, custody or control relating to hazardous waste, sludge, drums or objects or other tangible things relevant to the case against said Defendants, and also discovery of any "Brady" material.

3. A true bill was returned on November 18, 1988 against the third Defendant, namely, Robert Dale White, who was arrested March 9, 1990 and now represented by Court appointed counsel, the Honorable William Mathews.

4. That samples were taken in which both the Alabama Department of Environmental Management and the Environmental Protection Agency had when the indictments were issued against the said Defendants.

5. That since the indictments have been returned and since the Court's aforesaid discovery order dated February 24, 1989, all samples have been destroyed through no fault of any Defendants.

6. The State in it's [sic] brief to the Court cited Reed v. State, 401 So.2d 131, 137 for the proposition that test results are in and of themselves sufficient to make out a prima facie case, without the admission of samples on which the tests were conducted. However, this court notes that the testimony of the State Toxicologist went in without objection and as a result thereof, our Criminal Court of Appeals held that a prima facie case was made.

7. That the destruction of the samples in this cause would only allow test results as evidence against the Defendants and the destruction of the evidence does not allow the Defendants access to any potentially exculpatory material.

Accordingly, it is ORDERED and ADJUDGED by the Court:

1. That the test results received by the State in this cause shall not be received in evidence.

2. That all other motions shall be stayed as the State has indicated it will appeal any adverse ruling by this Court.

DONE and ORDERED this 22nd day of February, 1991.

D. Al Crowson
Circuit Judge

APPENDIX B

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1991-92

CR 90-784

State of Alabama

v.

McRay Gingo, a/k/a McRay Jingo;
Atlas Industrial Painters, Inc.;
and Robert Dale White

Appeal from Shelby Circuit Court
CC-88-543; CC-89-050; CC-90-450
JUDGE BOWEN

The Opinion of this Court issued October 25, 1991, is hereby withdrawn. The following becomes the opinion of the Court.

This is an appeal, pursuant to Rule [illegible].A.Crim.P.Temp. (now Rule 15.7,

A.R.Crim.P.), from the pre-trial order of the Circuit Court of Shelby County suppressing the results of tests performed by two different environmental management laboratories upon material alleged to constitute hazardous waste.

In November 1988, McRay Gingo and Atlas Industrial Painters, Inc., were separately indicted. Each indictment contained three counts, which charged: 1) illegally disposing of hazardous wastes at an unpermitted site in Walker County, Alabama, in violation of Ala. Code 1975, §22-30-19(e)(1); 2) unlawfully violating an order issued by the Alabama Department of Environmental Management (ADEM) dated May 28, 1986, which, in effect, required Gingo and Atlas to submit to ADEM a plan for the

proper disposal of certain hazardous wastes stored at the Atlas facility in Pelham, Alabama, in violation of Ala. Code 1975, §22-30-19(e)(6); and 3) unlawfully failing to prepare a hazardous waste manifest for the transportation of the hazardous wastes referred in the second count, in violation of ADEM regulations and Ala. Code 1975, §22-30-19(e)(6). Robert Dale White was separately charged in a three count indictment with: 1) unlawfully transporting hazardous wastes to an unpermitted site in Walker County, Alabama, in violation of Ala. Code 1975, §22-30-19(e)(1); 2) unlawfully accepting and transporting hazardous wastes not accompanied by a hazardous waste manifest, in violation of ADEM

regulations and Ala. Code 1975, §22-30-19(e)(6); and 3) unlawfully transporting hazardous waste without having received an Alabama Hazardous Waste Transport permit from ADEM, in violation of Ala. Code 1975, §22-30-19(e)(6).

The circuit court granted the appellants' motions for production and disclosure and ordered pretrial discovery pursuant to Rule 18.1, A.R.Crim.P.Temp. (now Rule 16.1, A.R.Crim.P.). When it was discovered that samples of the waste material had been destroyed, the circuit court ordered the suppression of the test results of that material.

The pertinent facts are listed in chronological order:

November 26, 1986 - Three or four samples of suspected hazardous wastes were collected by ADEM from 50 drums on a vacant lot in Walker County, Alabama, and transported to the ADEM laboratory in Montgomery for analysis. They were received at the laboratory in December of 1986, R. 106, and analyzed on December 12, 1986. R. 120.

January 1987 - ADEM receives test results. R. 102.

April 23, 1987 - ADEM refers the case to the Alabama Attorney General. R. 99.

April 29 or May 1, 1987 - Samples collected by ADEM disposed of R. 93, 106.

August 6, 1987 - Environmental Protection Agency (EPA) collects four samples from a site on Gardner Road in Walker County. These samples were sent to the EPA environmental management laboratory in Athens, Georgia, and were received there on August 7, 1987. These samples were taken to determine if hazardous waste was present at the site.

At that time, the EPA was proceeding with the matter as a civil case rather than a criminal one. R. 47. The EPA objective was "to get the [site] cleaned up." R. 72.

September 25, 1987 - An EPA administrative order dated September 21, 1987 is sent to appellants Gingo and Atlas.

December 1987 - Pursuant to an administrative order from EPA, appellant Gingo met with EPA representatives in Atlanta, Georgia, to discuss whether he was going to undertake the cleanup. R. 71. This administrative order included the laboratory results and a finding of fact.

January 1988 - EPA removes the material remaining at the Walker County site after appellant Gingo fails to conduct the cleanup.

An investigator from the attorney general's office collects samples from the dump site after learning that the "ADEM samples were no longer available." R. 94. Those samples could not be analyzed or "flash point tested" because the waste was not liquid but solid and "had rubberized. [I]t had been exposed to the climate for a long period of time." R. 95.

Although there was no testimony concerning the date these samples were collected, it must have been before the site was cleared by the EPA.

November 15, 1988 - Indictments are returned against appellants Gingo and Atlas.

November 18, 1988 - An indictment is returned against appellant White.

February 15, 1989 - Appellants Gingo and Atlas file a motion for production and disclosure. This motion specifically requested, among other things, the production of "[a]ny and all tangible evidence in the State's possession, care, custody or control relating to or consisting of . . . paint, hazardous waste, sludge, drums . . . ." CR. 12. The motion also requested "[a]ny and all . . . paint, sludge, hazardous waste, drums ... possessed or contained in the files of Alabama Department of Environmental Management, Shelby County Sheriff's Department, Walker County Sheriff's Department, Alabama Attorney General's Office . . . ." CR. 15

February 24, 1989 - Motion granted pursuant to Rule 18.1, A.R.Crim.P.Temp.

March 9, 1989 - By letter of this date, the Alabama Attorney General notified appellant Gingo that the "[s]samples of hazardous waste material previously analyzed by the ADEM laboratory . . . no longer exist." R. 57.

August 23 or 24, 1989 - EPA issues order to dispose of samples. R. 54, 86.

October 12, 1990 - Evidentiary hearing held on State's motion for pretrial determination of admissibility of evidence.

February 22, 1991 - The circuit court issued an order that "the test results received by the State in this cause shall not be received in evidence." CR. 70. In that order, the court found:

> "4. That samples were taken in which both the Alabama Department of Environmental Management and the Environmental Protection Agency had when the indictments were issued against the said Defendants.
>
> "5. That since the indictments have been returned and since the Court's aforesaid

> discovery order dated February 24, 1989 all samples have been destroyed through no fault of any Defendants.
>
> ". . . .
>
> "7. That the destruction of the samples in this cause would only allow test results as evidence against the Defendants and the destruction of the evidence does not allow the Defendants access to any potentially exculpatory material." CR. 69-70.

The Due Process Clause of the Constitution of the United States did not require the suppression of the test results. "[W]hen we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of

which might have exonerated the defendant," the good or bad faith of the State is relevant. Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988). "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Youngblood, 488 U.S. at 58, 109 S.Ct. at 337. "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or

destroyed." Youngblood, 488 U.S. at 57 n. ___, 109 S.Ct. at 337 n. ___. See also, United States v. Galvan-Garcia, 872 F.2d 638, 641 (5th Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 164 (1989). See generally, W. LaFave and J. Israel, 2 Criminal Procedure §195 (Supp. 1991).

The year before Youngblood was decided, the Alabama Supreme Court reached a contrary result in Ex parte Dickerson, 517 So.2d 628 (Ala. 1987), when it held that "under controlling authority, the good faith or bad faith of the prosecution is irrelevant." Dickerson, 517 So.2d at 630 (emphasis added). In Dickerson, the Court held that the intentional destruction by the police of evidence which might have

been favorable to the defendant "substantially impaired the defendant's ability to establish the favorable nature of the evidence and violated the defendant's right to due process." 517 So.2d at 631.

However, the "controlling authority" cited in Dickerson was all federal case authority. The only state case cited was Kennedy v. State, 472 So.2d 1106 (Ala.), cert. denied, 474 U.S. 975 (1985), which also relied only on federal case authority.

This Court conscientiously honors the statutory command that "[t]he decisions of the Supreme Court shall govern the holdings and decisions of the courts of appeals." Ala. Code 1975, §12-3-16. See Hampton v. State, 455 So.2d 149, 152 (Ala.Cr.App. 1984).

However, as was recognized in Minniefield v. State, 47 Ala.App. 699, 705, 260 So.2d 607 (1972): "At all events we are bound by the opinions of the Supreme Court of Alabama even on Federal questions unless the Supreme Court of the United States expressly or by necessary implication has ruled to the contrary." We conclude that Youngblood overruled Dickerson by necessary implication.[1]

---

[1]It does appear that in Duncan v. State, 575 So.2d 1198, 1204 (Ala.Cr.App. 1990), cert. denied, 575 So.2d 1208 (Ala. 1991), this Court erroneously assumed that Youngblood and Dickerson were consistent. However, because Duncan is presently on remand to the trial court after and pending direct appellate review by this Court, we will not re-examine on this occasion the conclusion reached there.

We further hold that under the principles of Youngblood, the destruction of the test samples and the waste material located at the dump site did not deny the defendants due process of law because those defendants have failed to show any "bad faith" on the part of the prosecution. All of the evidence was destroyed according to standard procedure. Furthermore, there is only the vaguest of speculation to support the contention that a third test of the waste material might prove that it was non-hazardous. It must be remembered that the waste material was independently collected and tested by two different laboratories -- one federal and one state. There has not even been the contention that there was

any conflict or discrepancy between the test results.

With regard to the results of the test conducted by the EPA, it must be observed that while it could be argued that the State had possession of the dump site from which the samples were taken by the EPA, the State did not have control over the samples taken by the EPA or over the results of the test conducted by the EPA. "Materials not possessed by the government cannot be suppressed within the meaning of Brady [v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)]." United States v. Rodriguez, 917 F.2d 1286, 1291 (11th Cir. 1990), affirmed on rehearing as to this ground and vacated in part on other grounds, 935 F.2d 194 (11th Cir. 1991).

The order of the circuit court dated February 22, 1991, suppressing the results of chemical tests of suspected hazardous waste material is reversed. This cause is remanded for further proceedings not inconsistent with this opinion.

APPELLEE'S APPLICATION FOR REHEARING OVERRULED;
STATE'S APPLICATION FOR REHEARING GRANTED;
ORIGINAL OPINION WITHDRAWN;
OPINION SUBSTITUTED;
REVERSED AND REMANDED.

All Judges concur.

APPENDIX C

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1991-92

1910360

Ex parte McRay Gingo, et al.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF CRIMINAL APPEALS
(Re: State of Alabama

v.

McRay Gingo, a/k/a McRay Jingo;
Atlas Industrial Painters,Inc.;
and Robert Dale White)

(Shelby Circuit Court, CC-88-543;
89-050)

JUSTICE KENNEDY

We granted certiorari review in this case to determine whether the State erred in destroying or allowing the destruction of samples of allegedly hazardous waste.

On November 26, 1986, four officials of the Alabama Department of Environmental Management ("ADEM") obtained three or four pints of waste from fifty 55-gallon drums in Walker County. In December of 1986, the samples were tested and found to be hazardous waste because of the characteristic of "ignitability" as defined by ADEM regulations. On April 23, 1987, the director of ADEM notified the Attorney General's Office of the findings and requested that the office conduct an investigation into to the dumping of allegedly hazardous waste in Walker County. The samples were then disposed of on April 29, 1987, or May 1, 1987. Although the ADEM laboratory director knew that the samples were

related to a possible criminal case, he disposed of the samples, because ADEM had no standard operating procedure for keeping evidence in criminal cases. (R.T. 28-29). We note that this was only the second case that ADEM had submitted to the Attorney General's Office. Since then, ADEM has established a procedure for maintaining samples related to a criminal case.

On August 5, 1987, ADEM notified the Environmental Protection Agency ("EPA") of the dumping of allegedly hazardous waste. The purpose of the EPA's involvement was to remove any hazardous waste and to identify the responsible parties in order to hold them civilly liable for the costs of the removal. The EPA collected samples

from the drums and determined that the samples were hazardous because of the characteristic of "ignitability" as defined by EPA regulations. On September 25, 1987, the EPA sent the defendants an administrative order and in December 1987, the defendants met with an EPA official concerning the EPA's findings. On August 23 or 24, 1989, the EPA destroyed the samples, in accordance with its standard procedure in civil cases. An EPA official stated that it was standard procedure to retain samples collected in the course of an EPA criminal investigation. The official stated that although she knew of an ongoing state investigation, she did not know whether it was civil or criminal in nature and that the State had not requested that the EPA keep the

samples. (R.T. 69, 53). She also stated that had the EPA known of the trial court's discovery order, the samples would not have been destroyed. (R. T. 63).

At some point, the Attorney General's Office took samples of the waste, but the waste had solidified and the samples could not be tested.

Two of the defendants, McRay Gingo and Atlas Industrial Painters, Inc., were indicted and charged with: (1) disposing of hazardous waste at an unpermitted site in Walker county, in violation of §22-30-19(e)(1), Ala. Code 1975; (2) violating an order issued by ADEM requiring that the defendants submit a plan to ADEM for the proper disposal of certain hazardous wastes,

in violation of §22-30-19(e)(6), Ala. Code 1975; and (3) failing to prepare a hazardous waste manifest for the transportation of certain hazardous waste, in violation of ADEM regulations and §22-30-19(e)(6), Ala. Code 1975.

The other defendant, Robert Dale White, was separately charged with: (1) transporting hazardous wastes to an unpermitted site in Walker County, Alabama, in violation of §22-30-19(e)(1), Ala. Code 1975; (2) accepting and transporting hazardous wastes not accompanied by a hazardous waste manifest, in violation of ADEM regulations and §22-30-19(e)(6), Ala. Code 1975; and (3) transporting hazardous waste without having an Alabama hazardous waste transport

permit from ADEM, in violation of §22-30-19(e)(6), Ala. Code 1975.

On February 15, 1989, the defendants filed a motion for production and disclosure of all Brady v. Maryland, 373 U.S. 83 (1963), material and evidence discoverable pursuant to Rule 18, A.R.Crim.P.Temp. Specifically, the defendants requested production of "any and all tangible evidence in the State's possession, care, custody or control relating to or consisting of ... paint, hazardous waste, sludge, drums." (C.R. 3). The trial court granted the motion, pursuant to Rule 18.1, A.R.Crim.P.Temp. On March 9, 1989, the State notified the defendants that all of the samples had been destroyed. The State then filed a motion for a pretrial determination of

the admissibility of evidence regarding the EPA and ADEM test results relating to the samples, for the purpose of using the test results at trial. (C.R. 23-25). After a hearing, the trial court suppressed evidence of the test results. In its order, the trial court stated, in pertinent part, as follows:

> "That two Defendants, namely, McRay Gingo and Atlas Industrial Painters, Inc., were indicted on November 18, 1988. Said Defendants employed the Honorable Frank Head as their attorney who filed a Motion for Production and Disclosure on February 15, 1989, which was granted pursuant to Rule 18.1 of A.R.C.P. on February 24, 1989. Said motion sought discovery of all scientific tests or experiments made by the State, as well as any and all tangible evidence in the State's possession, care, custody or control relating to hazardous waste, sludge, drums or objects or other tangible things relevant to

the case against said Defendants, and also discovery of any Brady material.

"....

"That samples were taken ... which both the Alabama Department of Environmental Management and the Environmental Protection Agency had when the indictments were issued against the said Defendants.

"That since the indictments have been returned and since the Court's aforesaid discovery order dated February 24, 1989, all samples have been destroyed through no fault of any Defendants.

The State in its brief to the Court cited Reed v. State, 401 So.2d 131, 135, for the proposition that test results are in and of themselves sufficient to make out a prima facie case, without the admission of samples on which the tests were conducted. However, this Court notes that the testimony of the State Toxicologist went in without objection and [that] as a result thereof, our [Court of Criminal Appeals] held that a prima facie case was made.

> "The destruction of the samples in this cause would only allow test results as evidence against the Defendants and the destruction of the evidence does not allow the Defendants access to any potentially exculpatory material."

(C.R. 69-70).

On appeal, the Court of Criminal Appeals reversed the trial court's order suppressing evidence of the test results. That court stated:

> "[W]hen we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant, 'the good or bad faith of the State is relevant. Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988). '[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve poten-

> tially useful evidence does not constitute a denial of due process of law.' Youngblood, 488 U.S. at 58, 109 S.Ct. at 337."

State v. Gingo, [Ms. 90-784, November 27, 1991] ___ So.2d ___, ___ (Ala.Crim.App. 1991). The court stated, in regard to the samples, that "all of the evidence was destroyed according to standard procedure." ___ So.2d at ___. The court also found that the State did not have "control" over the samples taken by the EPA and held, therefore, that the results of tests on those samples would not be subject to suppression under the terms of Brady v. Maryland, 373 U.S. 83 (1963).

We disagree with the Court of Criminal Appeals, because we conclude that the trial court correctly suppressed the evidence of the test results relating to the destroyed samples, under the facts of this case. The facts of this case are substantially different from those in Youngblood, cited by the Court of Criminal Appeals. In Youngblood, a 10-year-old boy was molested and sodomized. The police failed to refrigerate the boy's clothing, which had two semen stains on it. The police did refrigerate a "sexual assault kit," which contained a swab of semen from the boy's rectum. However, there was not enough semen present on the swab for accurate tests. At trial, the State presented evidence that the boy

had identified the defendant as his attacker. The State did not introduce any evidence of the assault kit or the clothing in its case-in-chief. An expert for the defendant testified that the defendant may have been completely exonerated by tests on the clothing if the clothing had been refrigerated. The Supreme Court held that to show a due process violation, the defendant must show bad faith on the part of the police in failing to preserve the potentially exculpatory evidence.

In Youngblood, the Supreme Court cited California v. Trombetta,a 467 U.S. 479 (1984), which involved a drunk driving prosecution.

> "The defendants sought to suppress the test results [indicating the concen-

> tration of alcohol in the defendants' blood] on the ground that the State had failed to preserve the breath samples used in the test. We rejected this argument for several reasons: first, 'the officers here were acting in 'good faith and in accord with their normal practice,' [Trombetta] at 488, 104 S.Ct. at 2533, quoting Killian v. United States, 368 U.S. 231, 242, 82 S.Ct. 302, 308, 7 L.Ed.2d 256 (1961); second, in the light of the procedures actually used the chances that preserved samples would have exculpated the defendants were slim, 467 U.S., at 489, 104 S.Ct., at 2534; and third, even if the samples might have shown inaccuracy in the tests, the defendants had 'alternative means of demonstrating their innocence.' Id., at 490, 104 S.Ct., at 2534."

Youngblood, 485 U.S. 51 (1988).

In the instant case, there is no evidence available to refute the test results, because the samples have been destroyed. The evidence necessary to convict the defendants of hazardous waste violations is the test results. The test results were part of the State's case-in-chief, i.e., the State had to use those tests results to carry its burden of proving the hazardous waste violations. In Trombetta, the police destroyed the breath samples according to a standard procedure. In the case at bar, there was no procedure for keeping the samples. In Trombetta, both defendants were stopped on a suspicion of drunk driving and then were given the breath test. In the case at bar, the defendants were indicted solely because of the tests done on the samples.

"[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Youngblood, 488 U.S. at ___, 109 S.Ct. at 337. "The presence or absence of bad faith by the police for the purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Youngblood, 488 U.S. at ___ (footnote), 109 S.Ct. at 337 (footnote), citing Napue v. Illinois, 360 U.S. 264, 269 (1959).

Although to show bad faith, for the purpose of showing due process violation, the defendant must show that the State had knowledge of the excul-

patory value of the destroyed evidence, "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." Youngblood, 488 U.S. at ___, (Stevens, J., concurring in the result). We think that this is such a case.

The State, on April 23, 1987, had knowledge of the results of ADEM's tests on the samples. A week later, ADEM's samples were destroyed. ADEM had no standard operating procedure for "what to do with evidence obtained in criminal cases." (R.T. 28-29). ADEM notified the EPA of the waste on August 5, 1987, and on August 6, 1987, the EPA

took samples of the waste. On February 15, 1989, the defendants filed a motion for production and disclosure, which was granted on February 24, 1989. On March 9, 1989, the State informed the defendants that the samples no longer existed. On August 23 or 24, 1989, six months after the discovery order had been entered, the EPA destroyed its samples. Although the EPA normally kept samples that were involved in a criminal case, EPA was not informed that these particular samples related to a criminal case. The Court of Criminal Appeals determined that the State did not have control over the samples taken by the EPA. However, the State was planning to use the EPA test results against the defendants at trial. Under the facts of this case,

we think that it would be fundamentally unfair to allow the State to use the results of the EPA or ADEM tests on the destroyed samples.

REVERSED AND REMANDED.

Hornsby, C. J., and Maddox, Shores, Adams, Stegall, and Ingram, JJ., concur.

ADDENDIX D

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT
OF ALABAMA
July 10, 1992

1910360 Ex parte McRay Gingo and Atlas Industrial Painters, Inc. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (Re: State of Alabama v. McRay Gingo, a/k/a McRay Gingo; Atlas Industrial Painters, Inc.; and Robert Dale White) (90-784)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

PER CURIAM- Hornsby, CJ., Maddox, Shores, Steagall, Kennedy and Ingram, JJ., concur.

1912C